No. 2850

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," her engines, etc., PACIFIC ALASKA NAVIGATION COMPANY (a corporation), and ALASKA PACIFIC STEAMSHIP COMPANY (a corporation), claimants,

Appellees.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

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F. D. Monck

BRIEF FOR APPELLANT.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant.

Filed this.....day of September, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLANT.

Statement of the Case.

This appeal is prosecuted from the decree of the District Court for the Western District of Washington,

Northern Division, disallowing interest in favor of appellant, an insurer of certain cargo lost on the steamship "Admiral Sampson" in the collision between that vessel and the steamship "Princess Victoria," from the date of the collision, to wit, August 26, 1914.

Appellant, together with a large number of underwriters, had insured the cargo on board the "Admiral Sampson". Shortly after the loss of that vessel and her cargo, appellant paid its insured the value of the cargo and became subrogated to all of the latters' rights against appellees. Appellant thereafter appeared in the proceedings instituted by the Canadian Pacific Railway Company, owner of the S. S. "Princess Victoria," to limit its liability, and filed its claim and answer, setting up its claims and demands.

By its interlocutory decree, the lower court determined that said appellee was entitled to a limitation of its liability to the appraised value of the "Princess Victoria," to wit, the sum of $286,225.10.

Subsequently, after considerable negotiations between the respective parties, the principal amount of appellant's damages, to wit, the sum of $31,392.04 was agreed upon. The question of allowance of interest, however, was expressly reserved for the court. When the matter came before the learned District Judge Neterer, he declined to allow interest from the date of the collision on the principal sum found due. A decree was then entered by Judge Cushman following the oral ruling of Judge Neterer fixing the principal amount of the damages suffered by the cargo claimants, including

appellant. The decree, however, expressly disallowed interest from the time of the collision, or any time prior to June 12, 1916, the day upon which the stipulation agreeing upon the principal amount of the damages was entered into.

It was also stipulated between the parties that the collision and the loss and damage approximately resulting therefrom were caused by the mutual fault and negligence of both vessels.

The question before the court, therefore, is whether or not in cases of collision, where both vessels are held in fault, an innocent cargo owner, or his insurer, is entitled to interest, from the time of the collision upon the principal sum found due it from the vessel in fault other than the one carrying the cargo.

The appellees and other underwriters interested, although they have not appealed from the decree disallowing them interest, have agreed as respects their claims to abide by the decision of this court in the present case.

Specification of Error.

Error has been assigned in the Apostles on Appeal to the decree of the District Court, as follows:

That the District Court erred in refusing and disallowing the Fireman's Fund Insurance Company interest upon its claim in the principal sum of $31,392.04, prior to June 12, 1916, in the order and decree of the District Court signed and entered on the 24th day of August, 1916.

The Argument.

The collision between the "Princess Victoria" and the "Admiral Sampson" occurred on August 26, 1914. The decree disallowing interest from the time of the collision, and from which this appeal is prosecuted, was made and entered on the 24th day of August, 1916.

It is thus apparent that since August 26, 1914, the cargo owners and their insurers have been deprived of their property or its equivalent, the value of it. Furthermore, they have been out of the use of the money admittedly due them, but withheld by the Canadian Pacific Railway Company.

Obviously, therefore, by the action of the lower court, they are not allowed the measure of damages universally applied in such cases. Their right against appellee is for a *restitutio in integrum.* They should be placed in the same situation as they were in on the day of the collision, more than two years ago. The object sought, in awarding damages in such cases, is to place the owners of the cargo as nearly as may be in the same position as if the collision had not occurred. Any other rule would not compensate them or make them whole.

The Supreme Court has said:

> "* * * It is settled law that the damages which the owner of the injured vessel is entitled to recover in cases of collision are to be estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted."
>
> *The Cayuga,* 14 Wall. 270; 20 L. Ed. 828.

See also

The Baltimore, 8 Wall. 377; 19 L. Ed. 463.

Manifestly, by allowing appellant the value of the cargo lost and disallowing interest on that sum, it is not being placed in the same position as if the collision, for which it is in no manner responsible, had not occurred. If interest is to be withheld, upon what theory can it be said that the leading maxim in such cases, *restitutio in integrum,* has been applied?

Certainly a cargo owner, above all parties affected by a collision, should be given the benefits of the rule universally applied in collision cases, both in England and in this country.

In

The Atlas, 93 U. S. 302; 23 L. Ed. 863, 7-8,

the Supreme Court said:

> "Goods shipped as cargo, and their owners, as in the case before the court, are innocent of all wrong; * * * and, having proved their case, they are as much entitled to full compensation in the admiralty as they would have been if they had elected to pursue their common law remedy, saved to them by the proviso contained in the 9th section of the Judiciary Act."

What, then, did the court mean when it there said that the innocent cargo owner was entitled to "full compensation"? The answer is found in the repeated decisions of that court and the lower federal courts. For instance, in

The Scotland, 105 U. S. 24; 26 L. Ed. 1001, the Supreme Court had before it a case arising out of a collision between the steamship "Scotland" and the

American ship "Kate Dyer". The "Kate Dyer" sank, and with her cargo, was totally lost. Subsequently, the benefits of the Act of Congress creating an act to limit the liability of shipowners, sections 4283-4289, of the Revised Statutes, were claimed by the National Steam Navigation Company.

The situation before the court, it will be noted, was therefore identical with the facts present in this case. In speaking of the measure of damages, the court said:

> "The question raised as to the rule of damages which should be adopted, in estimating the actual loss of the owners of the guano, was properly decided by the circuit court. The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and *interest.*"

In the judgment there referred to and affirmed, Circuit Judge Blatchford said:

> "But, the result of the principles laid down in the cases cited and considered, was held to be, that the proper rule of damages was the value of the cargo * * * *with interest at six per cent. from the time of the collision.*" (Citing cases.)
>
> *Dyer et al. v. National Steam Nav. Co.,* Fed. Cas. 4225; 8 Fed. Cas. 210.

The reason for the rule is apparent. The cargo owner and his insurer are entitled to a complete indemnity for the loss sustained by reason of the tort, and the interest is regarded as a part of the indemnification or damages awarded. It becomes necessary to allow interest in cases of delay in payment, because the

innocent cargo owner and his insurer have been deprived of the use of the money found due from the time of the collision. Appellant, together with the other insurers interested, would, without an allowance of interest, suffer a great loss, whilst for the whole of the intervening period the appellee has had the use and enjoyment of the money, and has been in a position to make profit out of it. Certainly the court will not permit such a result without just cause.

A shipowner is entitled to interest from the date of the collision.

Interest has been uniformly allowed in favor of a shipowner in collision cases from the time of the collision.

In

The Reno, 134 Fed. 555,

the Circuit Court of Appeals for the Second Circuit said:

> "The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, *to which interest may be added to afford complete indemnity.*"

In

The Cumberland, 135 Fed. 234,

it was said:

> "Where loss of value is awarded, *interest is ordinarily allowed from the collision to the time of payment.*"

In

The J. S. Gilchrist, 173 Fed. 666-672,

in speaking of the allowance of interest from the time of the collision, the court said:

> "The reason for the rule is that the party damaged is entitled to a complete return for the loss sustained by reason of the tort, and *the interest is regarded as a part of the indemnification or damage award.*"

In

The Rabboni, 53 Fed. 952-57,

Circuit Judge Putman said:

> "When not more than the value of the vessel and pending freight is given, *interest should justly be added, to make complete restitution.*"

The Circuit Court of Appeals for the Fifth Circuit, in

Galveston Towing Co. et al. v. Cuban S. S. Co., Limited, 195 Fed. 711,

speaking through Judge Pardee, said:

> "Error is claimed in allowing interest beyond the date of the decree, but *we think the only error in the matter was that interest was not allowed from January 20, 1909, the time of the collision.*"

In

North Shore Staten Island Ferry Co. v. The Huguenots, Fed. Cas. 10330; 18 Fed. Cas. 381,

the court said:

> "The libelant is entitled to full indemnification for the injury sustained, *and interest must be allowed,* or he will not receive such indemnification."

Similar expressions are found in many of the reported cases. They are too numerous to quote further from them. Suffice it to say that interest has been allowed in the following additional cases:

The Aleppo, Fed. Cas. 158;
The Mary Eveline, Fed. Cas. 9212;
The Morning Star, Fed. Cas. 9817;
The Grapeshot, 42 Fed. 504;
The Bulgaria, 83 Fed. 312;
The Illinois, 84 Fed. 697;
The Oregon, 89 Fed. 520;
The Mahanoy, 127 Fed. 773;
The Manitoba, 122 U. S. 97, 30 L. ed. 1095.

The rule in England is to allow interest in such cases from the time of the collision. Speaking of the rule Sir Charles Butt, in

The Kong Magnus, 1891, Probate Div. 223, 235,

where the question of interest was the only matter before the court, said:

> "* * * the view of the Court of Admiralty has been that the person liable in damages, having kept the sum which ought to have been paid to the claimant, and having therefore been able to receive interest upon it, ought to be held to have received it for the person to whom the principal was payable. * * * a clear and uniform rule has long existed in the Court which this tribunal now represents, and that rule has been, I understand, approved at least in one case by the Court of Appeal. I cannot therefore depart from it, and am bound to hold, somewhat against my inclination, that the plaintiffs are entitled to recover this interest."

See also

The Gertrude, 13 Probate Div. 105,

a decision by the English Court of Appeal.

A cargo owner or his insurer is entitled to interest from the date of the collision.

Thus it is apparent that interest from the date of the collision has been uniformly allowed to a shipowner in collision cases.

Why should a different rule be applied to the cargo owner or his insurer in a similar case? No reason is apparent, and we confidently assert that no tenable reason for such action can be advanced. On the contrary, there is every reason for giving the innocent cargo owner a complete indemnification, if anyone is to be made whole.

No consideration such as the fault of one vessel being greater than the other to the collision, can be indulged in. The actions of the cargo owners and their insurers are not involved. They are innocent of all wrong. No reason, we submit, exists to change or modify the rule when their interests are before a court. Certainly no reason, sufficient to justify the disallowance of interest is apparent in the present case.

The proper rule to be followed in cases of this kind, and which rule was ignored without sufficient cause by the District Court in the present instance, was announced by the Supreme Court of the United States as early as 1824, in

The Apollon, 9 Wheaton 361, 6 L. ed. 111,

and again in

The Scotland, supra.

In *The Apollon,* the court said:

> "Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, *together with interest upon the amount, from the time of the trespass.*"

Subsequently, the Court of Appeals for the Second Circuit, in

The Umbria, 59 Fed. 489,

followed it, the court saying:

> "In some of the causes the cargo was a total loss, none of it having been recovered from the sunken vessel. In such cases, the correct rule of damages is to allow the value of the cargo at its place of shipment, or its cost, including expenses and charges and insurance *and interest.*"

In the case of

Pacific Ins. Co. v. Conard, F. C. 10647, 18 F. C. 946-8-9,

the court said:

> "In marine trespasses the Supreme Court have, at different times, laid down the following as the rule of damages, in cases unaccompanied with aggravation. In (Murray v. The Charming Betsy) 2 Cranch (6 U. S.) 124, (Head v. Providence Ins. Co.) Id. 156, the actual prime cost of the cargo, *interest,* insurance, and expenses necessarily sustained by bringing the vessel into the United States. In (Del Col v. Arnold) 3 Dall. (3 U. S.) 334, the full value of the property injured or destroyed; counsel fees rejected as an item of damage. (Arcambel v. Wiseman) Id. 306. In (The Anna Maria) 2 Wheat. (15 U. S.) 335, the prime cost

> of the cargo, all charges, insurance and *interest.* In (The Amiable Nancy) 3 Wheat. (16 U. S.) 560, the prime cost, or value of the property at the time of loss, or the diminution of its value by the injury, and interest. In The Lively (Case No. 8,403), the prime cost and *interest.* In (The Apollon) 9 Wheat. (22 U. S.) 376, 377, where the vessel and cargo are lost or destroyed, their actual value, *with interest* from the trespass."

In

The Alexandria, F. C. 178,

the libelants' claim to interest was disallowed. Upon appeal to the court, it was said.

> "It seems to me that the libelants are entitled to interest. * * * *Their indemnity obviously will not be complete unless interest is allowed.*"

See also

25 Am. & Eng. Ency. of Law, 2nd Ed., p. 1038.

The reasons which induced the courts to allow interest to the shipowners in the numerous cases previously cited apply with greater force when considering the rights of an innocent cargo owner or his insurer. Because of their great number which but repeat the principle we refrain from quoting from the cases in which interest has been allowed to the cargo owner, contenting ourselves with calling the court's attention to a few of the many cases where the rule has been followed, viz.:

The Mary J. Vaughan, F. C. 9217 (Affd. 81 U. S. 258; 20 L. ed. 807;

The Ocean Queen, F. C. 10410;

The City of New York, 23 Fed. 616;

The Beatrice Havener, 50 Fed. 232;
The Eagle Point, 136 Fed. 1010;
The Beaver, 219 Fed. 134;
Union S. S. Co. v. Latz, 223 Fed. 402;
American-Hawaiian S. S. Co. v. Strathalbyn S. S. Co. (unreported), *No. 2728 of the records of this court.*

See also

Roscoe on Damages in Maritime Cases, pp. 29-100.

In fact in every case of which we have any knowledge, but the present one, the courts of this circuit have allowed interest from the time of the collision.

If, therefore, as stated by the Supreme Court, a cargo owner is entitled to full compensation in such cases, i. e., its value at the time of the collision, with interest from that date, we respectfully submit that the disallowance of interest in the present instance is not the giving of full compensation or an application of the rule *restitutio in integrum.*

The discretion of the court.

We are not unmindful of the decisions in which it has been held that the allowance of interest on damages rests very much in the discretion of the tribunal which has to pass upon the subject.

The Albert Dumois, 177 U. S. 240, 256; 44 L. ed. 751,

where the court said:

> "The allowance of interest in admiralty cases is discretionary, and not reviewable in this court *except* in a very clear case."

Our contention is that we come to this court with "a very clear case". The present appeal is much stronger than the one entertained by the Court of Appeals for the Second Circuit in

Milburn v. Thirty-Five Thousand Boxes of Oranges and Lemons et al., 57 Fed. 236,

where the action of the lower court in disallowing a libelant interest was reversed with instructions to give interest upon the amount found due.

See also

The Gertrude, supra.

We contend that there must be some adequate reason for the disallowance of interest in such a case as the present one before there is any reason or necessity for the application of the trial court's discretion. Manifestly, discretion does not mean the mere whim of the judge. It is not a capricious or arbitrary discretion that is intended, but an impartial, sound discretion guided and controlled in its exercise by fixed legal principles. It is not a mental discretion to be exercised *ex gratia,* but a legal discretion to be exercised in conformity with the spirit of the law on the subject, and in a manner to subserve and not to impede or defeat the ends of substantial justice. Equitable considerations should be present before there is even any room for the exercise of this discretion. It must be exercised for reasonable cause.

In a plain case, such as the one now before the court, discretion has no office to perform. Its exercise is

limited to doubtful cases where an impartial mind hesitates.

"Discretion," says the Supreme Court, "should not be a word for arbitrary will or inconsiderate action." "Discretion means the equitable decision of what is just and proper under the circumstances."

The Styria, 186 U. S. 1; 46 L. ed. 1027.

With that guiding test before the court how can the disallowance of interest in the present case be justified? Certainly no equitable consideration is present. There is no reason for thus penalizing the appellant or any of the other insurers. Appellant was forced to litigate and prove its claim. By appellee's action, it has been deprived of the use of its money for over two years. No action that it took in any manner occasioned appellee to suffer any loss or any hardship. It was in no manner to blame for the collision or the resulting litigation. On the contrary, it was an innocent party in the whole matter, patiently waiting for the sum admittedly due it, for it must be remembered that appellee confessed its fault for the collision which caused appellant's loss.

We feel, therefore, that no sufficient cause, no special reason, exists for the refusal of the court to follow the proper and customary rule and give appellant full compensation.

No consideration of the degree of fault such as called for the exercise of the court's discretion in allowing and withholding interest in *The North Star,* 44 Fed. 492; 62 Fed. 71, is here present. Neither is there any question about a vessel being materially bettered by the

repairs, or there being any doubt as to the extent of the damages, matters which were considered in the disallowance of interest in

The Alaska, 44 Fed. 498.

So, too, the long delay considered by District Judge Donworth in

Compagnie De Navigation Francaise v. Burley et al., 183 Fed. 166,

is not involved.

See the report of his conclusions in 194 Fed. 335, p. 336.

In such cases there may be some reason, in the exercise of the court's sound discretion, to disallow or reduce the usual rate of interest.

It is difficult, however, to imagine a case where there is less room for the exercise of a sound legal discretion, upon the question of the allowance of interest, than the present one. If the rule allowing interest is to be a rule and not mere judicial whim, then it certainly should have application in a case of the kind now before the court. No reason or consideration, if there be any, that could by any stretch of the imagination be invoked against the shipowners involved in this collision can be advanced to support the action of the lower court.

A cargo owner, says the Supreme Court,

> "* * * ought not to suffer loss by the desire of the court to do justice between the wrongdoers."
>
> *The Alabama and The Gamecock,* 92 U. S. 695; 23 L. ed. 763.

Manifestly, those words should be given some effect in this case. The appellant who is subrogated to the rights of the innocent cargo owner is similarly situated. It is thus entitled to the full compensation to which the Supreme Court has said an *innocent* cargo owner is justly entitled.

We respectfully submit, therefore, that the decree of the District Court should be reversed with directions to allow appellant interest from the date of the collision, on the principal sum found due.

Dated, San Francisco,
September 29, 1916.

Respectfully submitted,
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BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant.